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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 1

JUNIUS IRVING SCALES,
Petitioner,

v.

UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER

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No. 488

REPLY BRIEF FOR PETITIONER

The Government's brief does not depart significantly from the arguments put forth in its briefs when this case was last here. The new issues, arising chiefly from the evidence introduced at petitioner's second trial and this Court's opinion in *Yates* v. *United States,* 354 U. S. 298, are met chiefly by an effort to sweep them under the rug. Accordingly, only a few matters call for reply.

I. *Unconstitutionality of the Membership Clause on Its Face.* Understandably troubled[1] by Justice Brandeis' opinion in *Whitney* v. *California,* 274 U. S. 357, the Government essays a distinction which does not bear analysis. Since the California statute punished membership and Justice Brandeis concurred in affirming the conviction, it is argued (Govt. Br. 54-55) that the "implications" of the opinion are that a statute denouncing membership as a crime is not void on its face. But the concurrence was expressly rested (274 U. S. at 379-80) on the circumstance that there was evidence linking Mrs. Whitney with "a conspiracy . . . to commit present serious crimes", as well as on her failure to raise the "clear and present danger"

[1] In *Dennis* v. *United States,* 341 U. S. 494, the Court remarked (at 507) that its opinions subsequent to the *Whitney* case "have inclined toward the Holmes-Brandeis rationale" rather than to the views of the majority.

issue in the state courts. Not only the "implications" but the explicit language of the opinion make it clear that Justices Brandeis and Holmes would have found the membership charge constitutionally defective had the question been ripe for decision.[2]

Faced with the constitutional obstacles reflected in this opinion and raised by the absence from the membership clause of those factors (such as conspiratorial incitement to violence) relied on in the *Dennis* case to sustain the other provisions of the Smith Act, the Government once again seeks to salvage the clause by extensive judicial amendment.[3] This technique consists here of selecting adjectives from comments about the Communist Party, and reading them into the clause. Doctored by these proposed qualifications[4] (Govt. Br. 48-49, 52-53, and 56), the clause would read as follows (added words in italics):

> ". . . or becomes or is a*n active, purposive, rigidly disciplined, high-level* member of, or affiliates with, any *tightly disciplined, quasi-military, deeply conspirational* such society, group, or assembly of persons, knowing the purposes thereof . . ."

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[2]See the *Whitney* case at pp. 372-73 and 379 (Pet. Br. 30).

[3]Toward the theory adopted below—that membership is the same as conspiracy—the Government's attitude is cautiously benevolent (Govt. Br. 53-54). Support is sought from Justice Jackson's concurring opinion in *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 422 *et seq.* But it is clear that, in the passages from his opinion in the *Douds* case upon which the Government relies, Justice Jackson was expressing his opinion about Communist Party membership in general, and as a basis for regulatory action, rather than a postulate for application to individuals. Indeed, he supported his opinion upholding a portion of the "non-Communist affidavit" provision reviewed in the *Douds* case by pointing out that that statute does not do precisely what the membership clause does do (339 U. S. at 434): "But it is important to note what this Act does not do. The Act does not suppress or outlaw the Communist Party, nor prohibit it or its members from engaging in any above board activity normal in Party struggles under our political system . . . *No individual is forbidden to be or become* a philosophical Communist or *a full fledged member of the Party*" (emphasis supplied).

[4]From these is omitted the requirement of "intent" (Pet. Br. 25 note 30), which also is not specified in the membership clause.

This method of statutory interpretation—once described by Chief Justice Taft as making of the statute "a nose of wax"[5]—is especially attractive because it eliminates the unpleasant and awkward task, which this Court has hitherto been obliged to undertake, of weighing the constitutionality of statutes as they are written.[6] In the face of such a surrealist approach to words, it is perhaps idle to inquire whether the spare language of the statute could possibly have been intended to support so rich a gloss. Were such an inquiry deemed pertinent, the presence of the words "or

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[5] *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 518:

> "We fully concede that it is the duty of a court, in considering the validity of an act, to give it such reasonable construction as can be reached to bring it within the fundamental law. But it is very clear that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation.
>
> "One of the strongest reasons for not making this law a nose of wax to be changed from that which the plain language imports, is the fact that it is a highly penal statute . . . If we change it to meet the needs suggested . . . we are creating by construction a vague requirement, and one objectionable in a criminal statute . . ."

See also *United States* v. *Reese*, 92 U. S. 214, 221; *Trade Mark Cases*, 100 U. S. 82, 98; *Butts* v. *Merchants and Miners Transportation Co.*, 230 U. S. 126.

[6] The Government's error arises, of course, from confusing what might be proved about a particular individual or organization—the Communist Party was not the only organization that Congress had in mind when it enacted the Smith Act, as the Government's brief (p. 39) concedes—with what can reasonably be drawn from the language of the statute and the indictment. When not preoccupied with vexing problems of constitutionality, the Solicitor General states the elements of the membership clause (saving perhaps the questionable addition of intent) with substantial accuracy (Govt. Br. 77 note 33):

> ". . . in a 'membership' case, it suffices to prove that *the Party* (as such, and not necessarily including the defendant) engaged in the forbidden advocacy *and* that the defendant was a member of the Party with the necessary knowledge and intent" (emphasis in original text).

affiliates with"[7] seem to make it clear that "membership" was not intended to be so restricted and qualified a concept as the Government now purports to embrace.

II. *Unconstitutionality of the Membership Clause as Applied in this Case.* It is difficult to be patient with the Government's treatment of the constitutional issues presented by the trial court's admission into evidence, as proof of unlawful incitement, of the three documents relating to the Korean War (Pet. Br. 33-39). By quoting in the text of its brief (p. 62) a remark by the trial judge during a colloquy at the bench *prior* to his ruling on the admissibility of the group of documents offered by the prosecution for this purpose, and relegating to a footnote (note 25) the fact that three of the documents (those now in question) were subsequently received in evidence, the Government evades discussion[8] of the First Amendment's bearing on the situation, and of the constitutional consequences, fatal to the validity of petitioner's conviction, that flow from *De Jonge* v. *Oregon*, 299 U. S. 353, as applied to these circumstances.

It is indisputable (Pet. Br. 34-36) that the prosecuting attorneys offered these documents as specific proof of action-inciting advocacy. In connection with the First Amendment, the Government's brief disclaims (p. 61) what was said in its behalf at the trial,[9] but at a later point (pp.

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[7]Perhaps because of constitutional doubts, these words have not, so far as petitioner is aware, been relied on in prosecutions under the membership clause.

[8]By dint of this maneuver, the "Korean War documents" are discussed only at the end of the Government's brief (pp. 116-19), in the context of the due process clause, not of the First Amendment.

[9]The Solicitor General says (Govt. Br. 61) that "one" of the "four" prosecutors made the argument so repudiated, but as the record plainly shows (R. A11-A13 and Tr. 1143), both Mr. Gavin and Mr. Woerheide, the two attorneys who conducted the bulk of the prosecution, took the position that these documents constituted proof of unlawful incitement to action.

117-18) it adopts the same position by arguing that Party literature which "sows dissension" shows "that the Party is no mere intellectual or visionary group . . . but a serious *action*-organization." The prosecution, in summation, urged the jury to treat these documents as proof of the necessary element of incitement (R. A24), and successfully opposed the defense request to charge the jury[10] that such evidence is not alone sufficient to support a verdict of guilty (R. A33-A34), although the Government now concedes (Govt. Br. 117) that it "would certainly not suffice, of itself, to prove" unlawful advocacy.

Although the trial judge, at the prosecution's request, charged the jury (R. A41) that they could not find the defendant guilty unless they found him to be an "active" member of the Party,[11] the Government has now reverted (Govt. Br. 64-68) to the position previously taken by the Solicitor General[12] that "activity" is a finding for the court, not the jury, "in the same manner that a finding of the existence of 'clear and present danger' is one which is properly made by the court rather than by the jury", citing the *Dennis* case, 341 U. S. at 511-15. But the degree of an accused's individual "activity" in a group cannot be made an "external constitutional limitation" on the application of the Smith Act, analogous to the "clear and present danger" standard.

The "clear and present danger" doctrine is not peculiar to the Smith Act. It is a principle of limitation upon the general language of the First Amendment, and that Amendment, so limited, applies to any statute which impinges on

[10]The Government's suggestion (Govt. Br. 63) that other portions of the charge covered this point is unsupported by reference to any specific language, and is utterly without basis.

[11]The petitioner (Pet. Br. 41) made timely objection, prior to trial, to the absence of this allegation from the indictment, if "activity" were to be treated as an essential element of the offense.

[12]*Scales* v. *United States*, No. 3, October Term, 1957, Supplemental Memorandum for the United States on Reargument (pp. 3-5).

matters to which the Amendment relates. As applied to political advocacy, the test (as rephrased by Judge Learned Hand and approved by this Court in *Dennis* v. *United States*, 341 U. S. 494, 510) requires a judicial determination of a mixed question of fact and public policy.[13]

But the degree of petitioner's "activity" as a member of the Communist Party presents only an issue of fact about his individual conduct. It is not a general principle of Constitutional breadth; its determination would not require a judgment on matters of law or policy. If "activity" were to be made an issue in Smith Act proceedings, it would necessarily be one for jury determination, just as is the issue whether the advocacy in which a defendant is involved is of an "action-inciting" type.

Assuming the validity of the Government's contention, however, the consequence would be that petitioner's conviction must be reversed, inasmuch as the finding of "activity" was explicitly submitted by the court to the jury and, therefore, was not and could not have been made by the judge. This result reduces the entire argument about "activity" to absurdity,[14] and points to the pitfalls attendant upon reading into the statute words which Congress did not put there, and which cannot reasonably be implied from the legislative context, purpose, or background.

III. *Failure of the Indictment to State an Offense under the Laws of the United States.* The Government's response

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[13]See *United States* v. *Dennis*, 183 F. 2d 201, 215-16. It may be noted that, in other contexts, even questions of this broad and public type are sometimes left to juries. Cf. *Mitchell* v. *Harmony*, 13 How. 115, holding that the military seizure of private property is justified only where a jury has found that there was "immediate and impending danger" of its capture by the enemy, or "urgent necessity for the public service, such as will not admit of delay."

[14]The intricacies of the Government's position can perhaps be better understood in the light of *United States* v. *Noto*, pending here on petition for certiorari (No. 564 Misc.), which was tried before the Solicitor General espoused the "activity" limitation, and where no such instruction to the jury was given.

(Govt. Br. 68-74) to petitioner's argument that this prosecution is barred by Section 4(f) of the Internal Security Act, depends upon the following propositions:

(a) The purpose of Section 4(f) is to ensure that the membership clause of the Smith Act, which expressly requires knowledge as an element of the offense, will not be construed to punish membership without knowledge (Govt. Br. 73-74).

(b) Section 4(f) should be construed in such a way that the phrase "of any other criminal statute" has no limiting or other meaningful effect on any other statutory provision (Govt. Br. 73).[15]

(c) Section 4(f) should be construed in such a way that all Communists can avoid, by pleading self-incrimination, compliance with the registration provisions of the Internal Security Act, except Communist Party members (and officers!) who are inactive, who do not know the unlawful purposes of the Party as found by Congress,[16] and who have no intention of carrying those purposes into effect (Govt. Br. 68-74, which contains not a word in reply to petitioner's argument in its brief, pp. 50[redacted] pointing out that such is the inevitable consequence of the Government's position).

When such arguments are put forward by skilled lawyers, it is a fair inference that there are no better ones. Once again, inconsistencies are the natural result. Elsewhere (Govt. Br. 85) the Government contends that, if a

[15]The Government's remark (Govt. Br. 72) that if the membership clause "did not cover Communists, it would be unlikely to cover anybody" is apparently frivolous, since earlier in its brief (p. 39) it points out that the Smith Act is also directed against Nazi and Facist movements.

[16]See 50 U. S. C. 781 (15), specifically referring to Communist "indoctrination" for the violent ends specified in the other paragraphs of this section.

Party member is a "leader", that "is in itself [per se?] strong evidence" of knowledge and intent. But Section 4(f) also covers "the holding of office", and officers are certainly likely to be "leaders". Adopting the Government's evidentiary conclusion, therefore, it is plain that Section 4(f) was indeed intended to apply to Party members who, as officers, are likely to have the requisite knowledge.

Throughout the Government's discussion of this issue runs the assumption that Congress could not possibly have intended in 1950 to exclude Communists from the scope of the membership clause, because it was against Communists that the Internal Security Act was primarily directed. This overlooks that there are various legislative methods of dealing with Communism in its relation to internal security. In the Internal Security Act, Congress utilized the method of registration, and Section 4(f) manifests a conclusion that the constitutionality (under the Fifth Amendment) of the registration provisions is more important than prosecution under the membership clause, particularly since the advocacy and organizing provisions of the Smith Act, under which prosecutions of Communists have usually been conducted, remain undisturbed by Section 4(f).

IV. *Insufficiency of the Evidence.* For all the many pages (Govt. Br. 75-88, 121-39) that the Government's brief devotes to the evidence concerning the Communist Party, there is no statement of what specific evidence, present here but not in the *Yates* case, is relied upon[17] to justify a departure here from this Court's conclusion (354 U. S. at 329) that the evidence in the *Yates* case was insufficient to establish that the Party advocates forcible over-

[17]The closest the Government comes to this vital point is its assertion (Govt. Br. 78 note 34) that there were seven prosecution witnesses at petitioner's second trial who did not testify in the *Yates* case. But, of course, it is not the identity of the witnesses—whether new or old—but the content of their testimony that is significant for present purposes.

throw "in the sense of a call to action at some future time."

From the general tenor of its brief, however, it is apparent (Govt. Br. 78-85 and 126-39) that the Government relies principally upon statements attributed to Communist functionaries at "Party schools" in Colorado, California, St. Louis, Chicago and New York. The themes and subjects stressed by the Government are the elimination of "revisionism" and "reformism", indoctrination in the "Marxist-Leninist" view that ultimately violence will be necessary to establish Communism, the establishment of Party "cadres", the historical object lessons of the Paris Commune of 1871 and the Russian Revolution in 1917, and the role of Communists as "professional revolutionaries" who must stand ready for action at an opportune time in the future.

Some of the Communist speakers are said to have used lurid expressions in expounding these doctrines, but the fact remains that they are all doctrines, entirely lacking in any present "call to action".[18] Furthermore, every one of these themes and subjects was dealt with in much the same way in the testimony of the prosecution witnesses in the *Yates* case (R. A26-A31, especially items A8, A11, A12, A16, A20, A22, A24, B2, B4, B5, C1; D1 and D3).

None of these "school" statements relied on by the Government was made in the presence of the petitioner and, for reasons already set forth (Pet. Br. 39-41 and 56-71), they cannot, with due regard for the First and Fifth Amendments, be made binding on him. As in the *Yates* case (354 U. S. at 329-30), the statements antedate the limitations period, some by a number of years. If more numerous than the similar statements in the *Yates* case, the Government's proof is still the same "sporadic showing" that was held insufficient there.

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[18] *Cf* the testimony (R. A5-A7) of one of the principal prosecution witnesses when asked on cross examination to list her *activities* as a Communist.

So far as concerns the evidence of petitioner's personal knowledge and intent, the record is not significantly different from that in the first trial. The Government perforce ignores this Court's intervening decisions in *Nowak* v. *United States*, 356 U. S. 660, and *Maisenberg* v. *United States*, 356 U. S. 670, in which expressions comparable to those attributed to the petitioner were characterized as "abstract predictory opinions", which fail to show "advocacy of action".

V. *Prejudicial Errors in the Admission of Evidence.* The Government makes no real effort to justify the admission of extensive evidence which was remote, irrelevant and prejudicial (Pet. Br. 69-71). It is argued (Govt. Br. 116) that, since the petitioner was a "Party leader", he was, therefore, "privy" to "secret advocacy", whether he was present or not, because he was an "integral and knowledgeable member of the group". It must be inferred that petitioner obtained this "knowledgeable" status at a remarkably tender age, if such a theory is deemed to justify the reception of testimony about events which allegedly transpired in New York and Seattle in 1930 (R. 7-16 and 149-50; Tr. 87-105 and 604-05).

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